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BRIEF ON MERITS

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 42

WILLIE B. MOORE,

Appellant

v.

STATE OF MICHIGAN

On Writ of Certiorari to the Supreme Court of the State of Michigan

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BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

I

A

Opinion [*]

In addition to the opinion of the court below which is reported in *People v. Moore*, 344 Mich. 137 (R. 90-99), we also invite the Court's attention to the opinion of the successor judge denying petitioner's delayed motion for a new trial (R. 81).

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[*] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

B

Appendix

We are including herewith as Appendix "1" pictures of the court house and jail at Kalamazoo, Michigan, in which the petitioner was confined and in which he entered his plea of guilty. The Court's attention is invited to the fact that the fifth floor, or the top floor, in which defendant was confined, is surrounded by a cement wall and that there are no windows which would permit defendant to see outside the walls into the streets.

II

Jurisdiction

Certiorari having been granted, jurisdiction is conceded.

III

Introduction

Constitutional provisions and statutes involved.

We concede that the constitutional provisions and statutes cited by appellant in his brief are accurate. We also cite the following Michigan court rules and statutes for the further information of the Court:

1. Section 16, Chap. XV, Act 175, Public Acts 1927, State of Mich., Comp. Laws 1948, § 775.10; Mich. Stat. Ann. (Henderson) § 28.1253 cited by appellant has been amended by Act 256, Public Acts of 1957, effective September 27, 1957 to provide counsel for defendants to conduct their ex-

aminations before a justice court or examining magistrate, which reads as follows:

> "Whenever any person charged with having committed any felony or misdemeanor shall be unable to procure counsel, and upon proper showing the presiding judge shall appoint some attorney to conduct the accused's examination before a justice court or examining magistrate and to conduct the defense and the attorney so appointed shall be entitled to receive from the county treasurer on the certificate of the presiding judge that such services have been fully rendered, such an amount as the presiding judge shall in his discretion deem reasonable compensation for the services performed."[1]

2. We also cite Mich. Comp. Laws 1948, § 769.26:

> "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

3. We also cite Mich. Comp. Laws 1948, § 768.35; Mich. Comp. Laws 1929, § 17328; Mich. Stat. Ann. § 28.1058:

> "Whenever any person shall plead guilty to an information filed against him in any court, it shall be the

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[1] Michigan now provides the assistance of counsel at every stage of prosecution from arraignment to sentencing, as suggested by this Court in *Carter v. Illinois*, 329 U.S. 173, at 174.

duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied after such investigation as he may deem necessary for that purpose respecting the nature of the case and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. And whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered and order a trial of the issue thus formed."

4. Appellant in his brief refers to Michigan Court Rule 35-A,[2] which he admits was not in effect when appellant Moore pleaded guilty. This rule was adopted June 4, 1947 and became effective September 1, 1947; four months after the decision in *DeMeerleer v. Michigan* (1947) 329 U.S. 663:

"Sec. 1. Arraignment. If the accused is not represented by counsel upon arraignment, before he is required to plead the court shall advise the accused that he is entitled to a trial by jury and to have counsel, and that in case he is financially unable to provide counsel the court will, if accused so requests, appoint counsel for him. If the accused states he will procure counsel or requests that counsel be appointed, a reasonable time thereafter shall be allowed for counsel to consult with the accused before his plea shall be taken.

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[2]

Under this rule it is now mandatory for the Court to apprise the accused, before he is required to plead, of his right to have counsel, at public expense if necessary, and a jury trial. If the accused desires counsel, he shall be given a reasonable time to consult with him before entering his plea. See Mich. Court Rules Ann (Honigman) p. 363.

"Sec. 2. Imposing sentence. If the accused pleads guilty, after such plea and before sentence the court shall inform the accused of the nature of the accusation and the consequence of his plea; and regardless of whether he is represented by counsel, the court shall examine the accused, not necessarily under oath, and as a condition of accepting the plea of guilty and imposing sentence shall ascertain that the plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. Unless the court determines that the plea of guilty was so made, it shall not be accepted.

"Sec. 3. Record. The trial court shall cause a stenographic record to be made and promptly transcribed of the proceedings had under sections 1 and 2 above, and shall certify over his signature thereto that the same is a true record of the proceedings had. Thereupon the record so made shall be filed with the clerk of the court and become and be kept as a part of the record in the case. In any subsequent proceedings such record shall be competent evidence of the facts and circumstances therein recorded. This rule is mandatory but failure to comply therewith shall not be considered jurisdictional."

IV

Counter-Statement of Questions Involved

Defendant claims that he was deprived of Due Process violated by the State of Michigan because a Judge accepted his plea of guilty without appointing an attorney and he also claims that coercion and duress were used to force him to enter this plea. We agree that these are the issues in-

volved in the present case but we cannot accept the statement of questions involved as presented by petitioner, which are argumentative, state the facts incorrectly, and present a truncated version of the concept of due process. We believe that the following two questions present the statement of the questions involved much more fairly and concisely:

Point 1

In the circumstances peculiar to this case, was petitioner denied due process of law because under the then-current state court procedure (specifically approved by this Court in Quicksall v. Michigan, 339 U.S. 660) no verbatim stenographic record was made of his arraignment on an information charging murder, to which he pleaded guilty, although, in a hearing on a delayed motion for new trial ten years after acceptance of the plea, the successor judge (the original trial judge having meantime died) permitted reconstructing testimony of disinterested witnesses present in court on the occasion of the original arraignment to be admitted to supplement the formal record of the proceedings, the Court's own Journal, which contained the remarks of the trial judge in reviewing the proceedings as well as the results of the judge's statutory investigation to determine whether the plea was made freely and voluntarily, with full knowledge of the nature of the accusation and without undue influence?

Point 2

Upon the record in this case, has petitioner sustained the burden of proving such a disregard of fundamental fairness in the imposition of punishment by the State as would justify this Court in setting aside the sentence as violative of the Due Process Clause?

V

Counter-Statement of the Case

We point to such insufficiencies as are deemed to exist in petitioner's statement of the case.

The information (R. 4) on which petitioner was arraigned was not complicated but couched in simple understandable language reading in substance "that Willie B. Moore heretofore, to wit: on or about the 26th day of October, 1938, at the city of Kalamazoo, in the county of Kalamazoo aforesaid, murdered Josie Zeedyke."[3]

Although the court reporter's transcript recites (R. 6) that the accused was arraigned and pleaded guilty, the official journal entry (R. 20) which under Michigan law raises strong presumptions, discloses that following such plea but before imposing sentence, the trial judge took two important procedural steps in compliance with State law:[4] (a) the court was satisfied "after such investigation as was deemed necessary for that purpose, and by private exami-

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[3]

Michigan's Code of Criminal Procedure, Chap. VII, §§ 43 and 44 (Comp. Laws 1948, §§ 767.43, 767.44 (Mich. Stat Ann 1954 Rev Vol 25, §§ 28.983, 28.984)] permit the use of just such a simplified short form information in a case of murder.

[4]

Section 35 of Chapter VIII of the Michigan Code of Criminal Procedure [Comp. Laws 1948, § 768.35 (Mich. Stat Ann. 1954 Rev. Vol. 25, § 28.1058)] cited supra, requires the trial judge to conduct an investigation into the voluntariness of any plea of guilty, while § 318 of the Mich. Penal Code [Comp. Laws 1948, § 750.318 (Mich. Stat. Ann. 1954 Rev. Vol. 25, § 28.550)] requires him to determine the degree of the offense of murder whenever an accused pleads guilty to that crime.

nation of the respondent, respecting the nature of the case and the circumstances of such plea, that the same was made freely and with full knowledge of said accusation, and without any undue influence"; and (b) he further proceeded "by the examination of four witnesses (R. 6-17) to determine the degree of the crime." Furthermore, before pronouncing sentence, the trial court asked the petitioner "if he had anything to say why judgment should not be pronounced against him." (R. 14)

The transcript of the court reporter, however, does show (R. 14-17) that after the trial judge had by examination of witnesses determined the degree of the offense of murder, he said (R. 15):

> "In my private interview with respondent I assured him that he must not plead guilty unless he really is guilty; that he was not required to plead guilty; that he could have a trial by jury if he desired it. He assured me freely and voluntarily that he is guilty and that his one desire is to have it all over, to get to the institution to which he is committed, and to be under observation and to be examined."

Over 10 years later, on September 9, 1949, after the trial judge had died, and the prosecuting attorney had through illness become incapable of speech (R. 70, 76), petitioner acting *pro se* filed a petition for leave to file a delayed motion to set aside his plea of guilty, to vacate judgment and sentence and grant a new trial (Calendar Entries, R. 2). Although this motion is not printed or relied upon by petitioner's counsel, following the filing of the motion the record does disclose that on the 16th day of May, 1950 the prosecuting attorney and defense counsel appeared in open court for the purpose of arguing the matter (R. 19-20). On the 16th day of May, petitioner's counsel stated in open

court, among other things, that they were not relying on any general allegations, but on "just two things, on this record and on the *De Meerleer* case" (R. 20). It was his contention that *De Meerleer* is "directly in point and fits on all fours the case before the Bar at this time." It was then and there understood between counsel that all other points were waived.

Therefore, on the 26th day of May, 1950, petitioner's counsel filed a substitute motion (R. 17-18) based on the following grounds closely patterning those in *De Meerleer v. Michigan* (1947), 329 U.S. 663:

> "1. Because the verdict is contrary to the law, whereas said Respondent was deprived of rights essential to a fair trial.
>
> 2. Because at no time was assistance of counsel offered or mentioned to Respondent.
>
> 3. Because said Respondent was not informed of the consequences of his plea of guilty.
>
> 4. Because said Respondent was not informed of the consequences of his plea of guilty.
>
> Because said Respondent, being of the age of seventeen years at the time of said trial and possessed of only a seventh grade education, was not otherwise aware of his Constitutional rights."

At close of the first hearing (R. 57-58) on petitioner's motion, however, after Moore in his testimony had introduced the subject-matter (R. 40-41), and after the sheriff into whose hands petitioner had been placed prior to his arraignment, had met the issue by testimony (R. 49-58), counsel for petitioner moved the court for leave to amend

his motion "to add the additional grounds that Willie Moore's plea of guilty was not voluntary because of intimidation and coercion by the police and threats of mob violence" (R. 58). The prosecuting attorney interposed no objection thereto, and the court granted the motion. Thus the question of voluntariness of petitioner's plea is before this Court.

The following is an analysis of the testimony taken in open court upon hearing the petitioner's motion. We have broken it down into 3 divisions, (1) testimony bearing upon petitioner's age and lack of court experience, (2) testimony concerning his claim that upon arraignment he was not informed of his constitutional rights, and (3) testimony regarding his contention that his plea of guilty had been induced by coercion and intimidation.

1. Age and Experience—

When arraigned on a charge of murder in 1938, while petitioner undoubtedly was only 17 years of age, he had had some recent experience in court procedure. On or about the 8th day of October of that year, according to testimony of Walter W. Coe, a colored police lieutenant of the city of Grand Rapids, Michigan who as such had jurisdiction of colored cases as they came in (R. 24-25), Willie B. Moore, who had been arrested by Kalamazoo police upon request of Grand Rapids, was taken by him to the latter city where he was charged with unlawfully driving away an automobile, an offense punishable as a felony, Michigan Penal Code, § 413 [Comp. Laws Mich. § 750.413 (Mich. Stat. Ann. 1954 Rev. Vol. 25, § 28.645)] (R. 24).

This officer testified (R. 23) that Moore when arrested freely admitted theft of the car; that later in his presence he asked the boy's father whether he wished to employ a

lawyer for his son, and he replied no, that his son had already told him he had committed the offense and there was no need for an attorney.

On the 17th day of October, upon arraignment in the superior court of the city of Grand Rapids, Moore pleaded guilty to the charge aforesaid (R. 23). In response to a question whether there was then any discussion about the accused's right to counsel "or anything of that type," the officer replied that the trial judge asked Moore if he was pleading guilty of his own volition, whether he had been promised anything, or threatened in any way, that caused him so to plead, and that the accused replied, "No, I plead guilty because I am guilty." Thereupon he was given a suspended sentence, and 10 days later the officer learned (R. 23) that Moore had been arrested in Kalamazoo on a charge of murder.

Moore, in his testimony, denied that Detective Coe told him in Grand Rapids that he had a right to get an attorney or have the court appoint one for him (R. 41). He stated (R. 43) that his mother, not his father, had talked with him and the officer; that Coe had arranged for his mother to pay damages to the automobile in question, and when he went before the judge, Coe told him to plead guilty; when he did so he was immediately released on suspended sentence. The judge, Moore said, did not ask him about anything, other than to inquire whether he was guilty or not guilty (R. 43).

2. **Failure to advise of Constitutional Rights—**

Petitioner, upon direct examination (R. 40-47), testified (R. 50) that from October 26 to 29, 1938, while in custody, he was afforded no opportunity to call his family and he was positive that upon arraignment the trial judge did not

advise him of his right to counsel. Nor had he been told of such a right when arraigned in Grand Rapids on a previous occasion on a charge of auto theft (R. 41). However, he realized at the time that by pleading guilty to the charge of murder he could go to the penitentiary for the rest of his natural life but (because of alleged coercion presently referred to) there wasn't anything else for him to do, no other alternative (R. 41).

On cross-examination, however, Moore testified (R. 41) among other things, that during the period of his arrest awaiting arraignment on the murder charge, he tried to see his mother and father so he could have them make some arrangement to get a lawyer but he was not permitted to see them until after sentence; they had about half an hour to see him right after sentence. He wanted them to get someone; he didn't know whether he had a right to counsel or not. But he knew about lawyers and they were to help people in court.

He further testified (R. 42) that he was told he would go to prison for life if he pleaded guilty.

Moore also remembered (R. 45) that after his plea the trial judge took him into his private office. Sheriff Struble was also there who asked him certain things about the crime, leading him all the way through. While in private chambers the judge didn't talk about a jury trial but went on to ask the accused how old he was and (R. 45), how much schooling he had had. He did ask why Moore was pleading guilty and Moore did not reply (R. 45). Later Moore was again asked if the judge asked him why he pleaded guilty and he stated he did not (R. 45). He also inquired about his prior record in boys vocational school and a CCC camp (R. 45), and about stealing the automobile in Grand Rapids. He also asked Moore whether he had

worked at odd jobs in Zeedyke's house (where the murder took place), and he testified (R. 46):

> "I told the judge at that time that if I had have committed this here crime that Mrs. Zeedyke she would have knew me, knowing me as well as she did, that she would have made the statement that—who it was."

He further testified (R. 46) he did not tell the judge in chambers about wanting to get to an institution for care and observation but he did tell him he wanted to get away "from this mess here." When Moore and the trial judge came out of the private office, the judge read something in which he told what went on in chambers but it wasn't all true, though parts were true. Part was what Mr. Struble (the sheriff) and Mr. Tedrow (the prosecuting attorney) had told him (R. 47).

Examined by the court (R. 48-49), Moore testified that when the trial judge took him into his office, Sheriff Struble went along (R. 49). The sheriff was there (R. 48) reading off some of the details of the crime. Judge Weimer didn't tell him and he didn't know that murder carried life. He did not know what he was pleading to, but he was trying to get away from the mess. He did not know that a woman had been killed (R. 48-49) or that he was charged with having killed her. But he knew, when the prosecuting attorney read it off to him, that he was charged with murder but he did not know that murder carried life. He was not familiar with law at that time. He didn't think that murder carried anything because he hadn't come in contact with the law, except as a juvenile.

Reint Schurr, a practicing attorney in the city of Kalamazoo (R. 27), who was present in open court as a spectator and probably while awaiting the call of another matter,

testified (R. 27) that court convened at 9:00 o'clock in the morning. When Moore was brought in (R. 28), he stood at the front end of the counsel table for two or three minutes, awaiting the arrival of the trial judge. Immediately after court convened, the prosecuting attorney read the information to Moore and then said: "Which means, and which charges that you did murder on a certain day Mrs. Zeedyke" (R. 28).

After the court reporter had testified (R. 29-32) that in 1938 it was not the procedure to take notes at an arraignment, that it was the practice of this trial judge to arraign accused persons in open court and if they pleaded guilty, take them into his private office to talk to them, Mr. Schurr continued his testimony (R. 32-34) by stating that when Moore pleaded guilty, there was some talk between the judge and the accused relative "to whether Mr. Moore had a lawyer or wished a lawyer, desired a lawyer." The witness did not remember whether the trial judge asked Moore whether he had a lawyer or whether he wanted a lawyer (R. 33), "but there was some conversation about a lawyer. That is as far as my recollection goes on that" (R. 33). Moore, however, according to the witness' memory, said he didn't want one, he wanted to get it over with (R. 33). On cross-examination, this witness stated (R. 34) that his recollection told him, as near as he could remember, that Moore didn't want anything to do with lawyers, he wanted to get it over with.

This witness further testified (R. 33) that after Moore pled guilty, the trial judge asked him if he realized the fact that if the judge determined that the plea was good and should be accepted, he could sentence him to prison for life, and Moore said he realized that. On cross-examination (R. 34) he remembered this distinctly but he could

not recall that the judge also informed him he had a right to trial by jury.

John Zeedyke, son of the murdered woman (R. 35), a county agent in charge of juvenile offenders and who at one time had Willie Moore as one of his probationers, testified (R. 35-37) he was in court when Moore was arraigned and remembered when the accused was brought into the court room for that purpose. The witness was seated in the first row of benches (R. 36), and he remembered that the trial judge asked the accused whether he had a lawyer and he desired to have a lawyer after he had pleaded guilty. The answer to both questions was no, and, the witness stated, "to me I couldn't imagine a man who admitted such a terrible crime to me I wouldn't understand why they would take that."

Examined by the court (R. 38, 39) Mr. Zeedyke further testified (R. 38) that the trial judge told Moore of the seriousness of the offense, the consequence of a plea of guilty, and that a crime like that could mean commitment to prison for life. Further, the judge asked Moore whether his plea of guilty was voluntary and without coercion (R. 38). He did not remember any mention of a jury trial.

3. Plea induced by coercion—

Asked on direct examination (R. 40-41) why he did not consider his plea of guilty voluntary, Moore replied it was because Sheriff's department officials told him that if he didn't plead guilty they couldn't protect him, "under those conditions, . . . during the riot," that they didn't know what people would do, and that they couldn't protect him. He confessed to this murder under duress (R. 40-41).

Examined by the court (R. 48-49), Moore repeated (R.

48) that the sheriff told him he could not protect him. That was the night before he was brought into court. "There was," he said, "loud noises and hammering on the cell door." He was put in an isolated cell. (R. 48)

Later in the hearing, after witnesses had testified on behalf of the State, Moore took the stand in rebuttal (R. 77-78) to testify that he had talked with the prosecuting attorney the night he was arrested and that he then denied any participation in the crime. The police talked with him that night (R. 78) until around about 2:00 or 3:00 o'clock in the morning. They got him up about 8:00 the next morning and talked to him again all that day until about 10:00 or 11:00 o'clock when he was brought over to the county jail. That was the 27th of October and the police talked to him again the next day around 8:00 in the morning. On the 28th he admitted participation in the crime, and he changed his story partly through duress and partly through promises on the part of the prosecutor. He promised (R. 79) that if Moore would cooperate with the officials he would see to it that he would get a shorter sentence. The chief of police "coincided" with the prosecutor. Police officers didn't beat him up badly but they "pushed him around" in the police station.

Moore further testified (R. 79-80) that something unusual occurred the night of the 28th of October in the county jail. Some people were brought upstairs on the fifth floor where he was in an isolated cell. The people were brought to this cell door to look in on the prisoner. Someone out there said, "Well, let's get him now, get it over with." That is when the hammering on the (cell) door happened. What the sheriff told him was that it would be best for him to plead guilty to the crime, "because he didn't know how long that he could give me proper protection." He

decided at that time to plead guilty; there wasn't very much else for him to do.

When Moore went to Jackson prison, they took a back road (R. 80) because, the sheriff said, there was a group waiting on the proper road, so he would take a round-about way (R. 80).

Charles Struble, who at the time of Moore's arrest, plea and sentence was sheriff of the county (R. 49-50) testified (R. 50) that during the time of Moore's incarceration in the county jail, the sheriff lived on the 5th floor of the county building in an apartment adjoining the jail. During the time that Moore was in jail, there was no mobs or other large groups of people that were either up in the jail or in the building (R. 52). There were, he said on cross-examination (R. 54), newspaper headlines and while there was very much tension in the community, there were no crowds around the jail. Asked if he heard any talk around the streets (R. 52) of any potential mob violence, the witness replied "there was conversation all about the streets in regard to it and making their remarks. I don't know as I could go into them," but he did not recall of any crowds gathering. No officers went into the Judge's chambers with Moore (50, 54).

The former sheriff also testified (R. 52) he did not tell Moore that he couldn't protect him nor did he advise him that it would probably be best to plead guilty. He told Moore that if he was guilty of the crime he might better own up on it because there could be trouble. "Tension is very high outside and there could be trouble. If Moore was not guilty, then, the sheriff told him, "I would stand pat forever after." He then advised him as follows: (R. 52-53).

"I spoke to him about what would be required of him and I would have to take him to the municipal court for his arraignment in the lower court . . . and I told him he would be entitled to a hearing in lower court and I says, 'There you will have the judge read to you and you can waive or demand an examination. You are entitled to an examination over there. It is my duty, and it is up to me to protect you, to use every effort at my command to protect you . . . but . . . the tension is very high out there and I am just telling you what could happen if it was started by someone.' "

The tension was high in the community. He didn't know whether he came out and said at any time for him to plead one way or the other, but, he testified (R. 53), "what I was putting over to him was the fact that if you are guilty and will be sent away you might better be getting away before trouble, because I had had information there was certain colored fellows, a group of them, that was going to interfere with me, and also that there was a bunch of Holland fellows going to meet me when I go to Jackson, they would meet me there at Galesburg there, and, therefore, when he was sentenced I avoided the main route and went way through by Gull Lake and across over in the hills there."

While Moore was in the county jail, however, no police or officers on the sheriff's staff threatened or intimidated him (R. 53).

Further (R. 54), he testified, when court was in session on this case there was quite a group of people around but nothing that appeared like unusual violence or anything of that kind. He could not recall anyone beating on the door of the county jail at any time while Moore was in custody. You can't beat on doors up there very well. They

were all steel doors and Moore was in a segregated cell there by himself. He did not believe Moore made any request to call his family.

O. K. Buder, who had Moore in custody when he was under sheriff in October, 1938 (R. 59-61), testified (R. 59) he was out in the street and in the main office on the ground floor (of the county building) probably a half dozen times during those two days. His living quarters were on the sixth floor of that building (R. 60). The jail is located on the top floor with a private elevator as means of access, and a stairway kept secret and locked so that any group of people would have to reach the jail by means of the elevator only, otherwise they would have to scale the walls of the building. During the time that Moore was in jail there were no large crowds in the jail or the main office. He knew nothing of banging on doors. It was utterly impossible for anybody to get in and bang on cell doors (R. 60). While church groups come up there three times a week, he had known of no large groups to get up to the jail against the wishes of the sheriff's department (R. 60). The jail elevator is locked.

On cross-examination, Buder said (R. 62-63) the jail records showed that on October 27, 1938 Moore was brought to the county jail and on the 29th he was transferred to prison at Jackson.

Glenn K. Hammel, chief deputy sheriff (R. 66) testified (R. 67) he "wouldn't want to go out on the tension part," although there was discussion of the Moore case such as they had the day of hearing, about a recent rape case in Kalamazoo. You might hear people in restaurants talking about it, or they might ask questions as to progress in the matter. At no time did he see large groups of people about the county building in October, 1938.

This witness further testified (R. 68) that while Moore was in court for arraignment, he was very relaxed and there was no sign of fear. He was nonchalant.

VI

ARGUMENT

Point 1

In the circumstances peculiar to this case, was petitioner denied due process of law because under the then-current state court procedure (specifically approved by this Court in Quicksall v. Michigan, 339 U.S. 660) no verbatim stenographic record was made of his arraignment on an information charging murder, to which he pleaded guilty, although, in a hearing on a delayed motion for new trial ten years after acceptance of the plea, the successor judge (the original trial judge having meantime died) permitted reconstructing testimony of disinterested witnesses present in court on the occasion of the original arraignment to be admitted to supplement the formal record of the proceedings, the Court's own Journal, which contained the remarks of the trial judge in reviewing the proceedings as well as the results of the judge's statutory investigation to determine whether the plea was made freely and voluntarily, with full knowledge of the nature of the accusation and without undue influence?

The answer to this question, as a matter of law is to be found in *Quicksall v. Michigan*, 339 U.S. 660. In *Quicksall* the identical procedure complained of by petitioner in this case was reviewed by this court and approved in an opinion delivered by Mr. Justice Frankfurter. Coincidentally, Judge

Weimer, Circuit Judge for Kalamazoo County, Michigan accepted the guilty plea of *Quicksall,* as he did in the instant case. The circumstances following the guilty plea were formally stated by Judge Weimer for the record in *Quicksall,* at page 662:

> "The record may show that this respondent [petitioner] has just offered to plead guilty and has pleaded guilty to a charge of murder; that after a full statement by the respondent in response to numerous questions by the Court in open Court and after a private interview with respondent at chambers, in both of which he has freely and frankly discussed the details of this homicide as claimed by him, the Court being clearly satisfied that the plea of guilty is made freely, understandingly and voluntarily, an order has been entered accepting such plea of guilty." (Page 662)

This statement is identical with the statement made by Judge Weimer in regard to petitioner Moore. (R. 14-16) Following the acceptance of Moore's plea, the Judge followed the procedure outlined in *Quicksall.* As required by local law, he inquired into the degree of the crime. [CL 1948, § 750.318 (Mich Stat Ann § 28.550—Henderson 1938)].[5] Witnesses were called to the stand in the

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[5]

"The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk."

present case and their testimony recorded. They detailed the circumstances surrounding the murder of Mrs. Zeedyke. One of the witnesses, the daughter of the victim, placed petitioner at the scene of the crime just prior to the commission of the murder. Following their testimony Judge Weimer sentenced Moore to life.

A similar sentence was imposed upon Quicksall by Judge Weimer. [CL 1948, § 750.316 (Mich Stat Ann § 28.548—Henderson)].[6]

Many years after his sentence *Quicksall* petitioned the Circuit Court for Kalamazoo County, Michigan, to vacate his sentence and to grant him a new trial. Like the present petitioner, he claimed there were constitutional infirmities in that he did not have assistance of counsel and the plea was induced by misrepresentations. Judge Weimer heard the motion to vacate the sentence and permitted reconstructing testimony. The sheriff, Quicksall himself, and other witnesses testified. In *Quicksall*, Judge Weimer [the successor Judge in the present case] took no stock in the reconstructing memory of the petitioner and denied his motion. After affirmance by the Michigan Supreme Court the case was reviewed by this Court and affirmed.

We believe it is sufficient for us to cite *Quicksall* as authority for our claim that the proceedings surrounding the plea of guilty and the testimony which was subsequently taken by the successor Judge to determine the events which

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[6] "All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first [1st] degree, and shall be punished by solitary confinement at hard labor in the state prison for life."

happened on the date of petitioner's arraignment are not violative of due process but are perfectly proper. We also invite the Court's attention to the fact that the original record which was made in this case was complete under the procedures of the State of Michigan which were in effect at the time of the arraignment. (R. 29-32) Furthermore, respondent Moore has failed to show that any error was committed in the course of his proceedings. Error should therefore not be presumed at this late date, especially since the delay was created by respondent who has failed to excuse the lapse of such a long period of time in his brief. The case of *Simon Grigg v. The People*, 31 Michigan 471, cited by respondent in his brief, is not applicable to this case; there was no record whatsoever in that case as to whether an arraignment was had or a plea made. This is not the situation in the case at bar. The most potent argument is that respondent himself heavily relies in his argument upon the testimony given by him and by the sheriff at these later hearings. When the respondent filed his original petition for leave to file a delayed motion for new trial, the grounds upon which he relied were based on this Court's decision in *DeMeerleer v. Michigan.* Prior to the hearing on his motion for new trial, before Circuit Judge Lucien F. Sweet on May 16, 1950, his counsel, John W. Roxborough, II, advised the Court:

> "So there won't be any misunderstandings, we aren't relying on any general allegations; we are relying just on two things, on this record and on the DeMeerleer case. "I would like to call to the Court's attention that at that time Willie B. Moore was seventeen years of age; the extent of his education then was a seventh grade education. It is our contention that he did not have a fair trial and that contention is substantiated by the case of DeMeerleer vs. The People

of the State of Michigan, 329 U.S., 663, decided February 3, 1947.

"It is our contention that this case is directly in point and fits on all fours the case before the Bar at this time." (R. 20).

To this statement, Mr. William E. Sykes, the Assistant Prosecuting Attorney, replied:

"If the Court please, I understand now that the Defendant has waived all claims to a new trial on the basis of the grounds that he has stated in his motion and that all other grounds with the exception of the claim that the DeMeerleer case as stated—the citation as stated by Defendant's Counsel, in his support for his motion and the record as offered by the Defendant, and more particularly, the portions of the record that refer to the lack of counsel and the lack of advice of the right to Counsel, and the advice as to the consequences of a plea of guilty, is this correct? Is that the impression of the Defendant or the claim of the Defendant?

"MR. ROXBOROUGH: Yes, in addition to the other points in the DeMeerleer case, more particularly the quick justice as it has been called." (R. 20).

Following this statement of respondent's counsel, testimony was taken regarding the circumstances surrounding petitioner's plea of guilty. Petitioner himself took the stand and testified with reference to alleged intimidation and coercion which lead to his plea of guilty. At the close of the testimony, his counsel, Mr. Roxborough, then requested that the Court allow him to amend his motion to include the new grounds of intimidation and duress, which

it was alleged had been adduced from the testimony of the witnesses at the hearing on the delayed motion for new trial. This was granted and the prosecutor then requested adjournment in order to obtain rebutting testimony (R. 58). Thus we have a clear statement by appellant's counsel that he would accept the testimony of the witnesses, both at the first hearing of the delayed motion for new trial and at the subsequent hearings which were set by the Court at this time (R. 58).

In objecting to the testimony of the witnesses which was presented at the hearing on delayed motion for new trial, while at the same time using the same as an argument for the granting of the present petition before this Court, petitioner, it seems to us, is attempting to obtain the benefits of what might be termed a selective appeal. He uses such portions of the testimony as may suit his purpose while denying to the People of the State of Michigan the right to use any portions of the same testimony which might militate against his position. We doubt that this type of action conduces to the "cool review" of this case as urged by petitioner. This Court, we are certain, in its zealous desire to ascertain the truth of the circumstances surrounding Moore's plea will consider all of the reconstructing testimony here presented as did the Michigan Supreme Court in its review of the case and approve them as it did in Quicksall.

Point 2

Upon the record in this case, has petitioner sustained the burden of proving such a disregard of fundamental fairness in the imposition of punishment by the State as would justify this Court in setting aside the sentence as violative of the Due Process Clause?

We believe that our statement of the question is a fairer and more complete statement of the applicable law than that which was presented by defendant under his various subheadings.

When an accused without counsel acquiesces in a trial resulting in his conviction, and later seeks release; the rule is well settled that the burden rests upon him to establish that he did not completely and intelligently waive his right to assistance of counsel. 25 Am. Jur., § 50, page 180; *Johnson v. Zerbst*, 304 U.S. 458. The same rule applies to a subsequent claim that the plea was induced by coercion, by threats, or by intimidation. All the circumstances surrounding defendant's plea, such as his age and experience, his understanding of the plea, the fact whether it was free and voluntary, evidence of his education, mental capacity, experience, and understanding, are to be taken into consideration. Other factors to be considered are whether petitioner was ignorant of legal procedure, confused and bewildered, as well as the haste in placing him on trial, and the pressure, or lack thereof, to induce him to enter his plea. If defendant is competent, knows what he is doing, is aware of the offense charged and its penalty, as well as courtroom procedure, so as not to be confused or frightened by arraignment, surely such a waiver, regardless of the fact that he was only 17 years of age, must be allowed to stand.

In our analysis of the facts presented, *supra*, we subdivided the testimony down under 3 headings, (1) testimony bearing upon petitioner's age and lack of court experience, (2) testimony concerning his claim that upon arraignment he was not informed of his constitutional rights, and (3) testimony regarding his contention that his plea of guilty had been induced by coercion and intimidation.

We believe that a fair reading of the testimony presented

shows clearly that defendant in no way sustained the burden of proof of showing that his plea was not voluntarily made, that he was not informed of counsel at the time he entered his plea, that he was not aware of the consequences of his plea, and that he was not informed of his right to a trial by jury. Countervailing proof to the testimony of defendant was offered by the People in the petition for leave to file a delayed motion for a new trial which clearly confuted the contentions of defendant.

All of defendant's present allegations were passed upon by the successor Judge before whom petitioner and the other witnesses appeared. He was in a position to observe the demeanor of the witnesses, gave no credence to Moore's testimony, stated he did not believe him, and resolved all issues of fact against him, holding that he had not sustained the burden of proof laid upon those who seek to vacate a plea of guilty. (R. 81-84). This ruling of the successor Judge was later affirmed by the Michigan Supreme Court which reviewed his action. *People v. Moore*, 344 Michigan 137 (R. 90-99).

Petitioner relies most heavily upon the case of *DeMeerleer vs. The People of the State of Michigan*, 329 U.S. 663, both here and in the arguments on the motion for new trial before the Michigan Supreme Court. Perhaps a review of this case and the foundation of other Supreme Court cases upon which it rests may be helpful at this point. The opinion in *DeMeerleer* ends with reference to the action of the Court in *Betts vs. Brady*, 316 U.S. 445. It is therefore necessary that we determine the action of the Court in *Betts vs. Brady*. In *Betts* this Court stated that the question was whether petitioner's conviction and sentence was a deprivation of liberty without due process of law. The answer it concluded is to be found in the Fourteenth Amendment concept of due process.

The Court, through Mr. Justice Roberts, then discussed the question of whether the Fourteenth Amendment guarantees that in every case, whatever the circumstances, the accused must be furnished with counsel. Mr. Justice Roberts referred to the case of Powell vs. Alabama, 287 U.S. 45, in which the Court stated, "Under the circumstances * * * the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process," but added, "Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that is necessary now to decide, as we do decide, is that in a capital case, where the Defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the Court, whether requested or not, to assign Counsel for him as a necessary requisite of due process of law * * *."

Justice Roberts also discussed the cases of *Avery vs. Alabama*, 308 U.S. 444; and *Smith vs. O'Grady*, 312 U.S. 329, which are decisions on similar issues. From his discussion of these cases and of the fundamental laws of all the states, he concluded, at Page 471: "In the light of this vidence we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the State, whatever may be their own views, to furnish counsel in every such case. Every Court has power, if it deems proper, to appoint counsel, for that course seems to be required in the interest of fairness." The Court also remarked at page 462:

> "The phrase formulates a concept less rigid and of more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial of funda-

mental fairness, shocking to the universal sense of justice may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which, in a given case, may be to ignore the qualifying factors therein disclosed."

The firm logic so clearly expressed by the Court, makes it obvious that the decisions in each case must rest squarely upon the facts of that case. Each case differs from similar cases in such fashion that its primary value lies in its use as an analogy to the case at hand.

A close scrutiny of the facts in *DeMeerleer* is in order. The Court in that case based its opinion upon several factors:

1. A seventeen year old defendant.

2. Arraigned, tried and convicted of first degree murder and sentenced to life imprisonment all in one day when such legal proceedings were unfamiliar to him.

3. A serious and complicated criminal charge.

4. Never advised of his right to counsel nor was mention made of counsel.

5. Not apprised of the consequences of his plea.

In the case at bar we admit that a seventeen year old boy is involved and that the charge is a serious criminal offense, although not a complicated one. The record is clear and the Respondent admitted that the Information containing

the clear word "murder" was read to him and that he knew that he was being arraigned and charged with the murder of Mrs. Zeedyke (R. 45). From this point on, the present case varies greatly in its facts from *DeMeerleer* and other cases where a violation of due process has been determined to exist. It is believed that this can best be shown by discussing point by point the contentions of Respondent based on *DeMeerleer* as to the manner in which he was denied due process of law.

(a) The claim that petitioner's plea was gained by coercion and fear.

Although respondent, in his testimony on Motion for New Trial, claimed that he was frightened and that he had been coerced into the plea of guilty, all of the testimony on the record refutes such a claim. The testimony of a disinterested witness, Reint Schuur, an attorney of the city of Kalamazoo, was to the effect that the judge inquired into the facts concerning this murder in open Court and that this conversation went on for some fifteen minutes, and that following that the Judge talked with Moore alone in his private chambers (R. 26-29). Sheriff Charles Struble, on the Motion for New Trial also testified in this regard:

"Q. While he was at your jail, do you remember any police officers on your staff threatening him?

A. Oh, not at all.

Q. Or intimidating him?

A. Oh, no.

Q. You don't recall that?

A. I don't recall that and I doubt very much if there

was anything of that kind, because he was treated with respect all the way through." (R. 53-54)

Sheriff Struble also testified that there was no request made by petitioner to call his family (R. 55).

A third witness, Glenn K. Hammel, who was a deputy sheriff at the time of the arraignment and chief deputy at the time of testimony, testified:

> "He was very relaxed. There was no sign of fear and no showing, either physically or by speech." (R. 68)

Mr. Hammel also stated that he was nonchalant (R. 68).

Raymond W. Fox, one of the Judges of this Circuit, who was assistant prosecuting attorney, at time of the arrest testified that he was present when Willie Moore was questioned in the police station; that he thought that his answers were fair, honest and candid, and that he seemed very calm and not excited in the least. He spoke about the crime quite in a matter-of-fact way. His whole attitude was such that it was hard for the witness to understand his lack of emotion in telling the story of just what happened. (R. 68-69). Judge Fox also testified that he remembered nothing unusual about Willie Moore at the time of his questioning (R. 77).

In view of the overwhelming weight of this testimony, it is apparent that there was no coercion or duress used in obtaining a plea from this petitioner and that he was not in fear at the time that he pleaded guilty. The fact that the Trial Judge spent almost a half hour, both in open Court and in private in his chambers with this petitioner discussing the crime, is corroborative of this fact since it is not alleged that the Trial Judge was a party to the

coercion that petitioner complains of, and it is apparent that in this amount of time the Trial Judge most certainly would have determined whether this plea were voluntary or not. As further evidence that this petitioner was not held without the knowledge of his parents is the fact that petitioner admitted in his testimony that he saw his parents in the police station. The fact that he did not talk with them is not a decisive factor since we have the sheriff's testimony that he made no request to be allowed to talk with them.

The instant case differs from *DeMeerleer* in that here the time element is different. The petitioner was arrested in the late afternoon of October 26th and examined before the magistrate on October 28th, taken into circuit court on the morning of the 29th, which is a far cry from being arrested, taken before the magistrate, tried, convicted and sentenced in one day as was the case in *DeMeerleer*. Nor was this petitioner ignorant of legal proceedings. A month prior to this time he had been arraigned and pleaded guilty to auto theft in Grand Rapids, in addition to having had considerable experience with the juvenile authorities prior to this time.

Perhaps the most conclusive evidence that there was no fear, coercion or duress is shown by the transcript of Judge Weimer's remarks at the time of sentence, which was taken in open court by the official court stenographer at the time of sentence. Judge Weimer stated: "Such is his story to me in private, told very calmly; without any compulsion whatever." (R. 16)

(b) The claim that petitioner did not knowingly waive his right to counsel.

We do not take issue with petitioner's claim that the

Court should inform him of his right to counsel, but do contend that the evidence clearly shows that he was fully apprised of this right. We refer once again to the testimony of Reint Schuur, who was present at the time of the arraignment and testified on the Motion for New Trial:

> "Then there was some conversation between the Judge and Mr. Moore relative to whether Mr. Moore had a lawyer or wished a lawyer, desired a lawyer. I don't remember whether the Judge asked him whether he had a lawyer or whether he wanted a lawyer, but there was some conversation about a lawyer. That is about as far as my recollection goes on that." (R. 33)

Mr. Schuur also testified along these lines at page 34 of the Record:

> "A. No, there was something said by the Judge asking whether he had counsel or whether he wanted counsel.
>
> Q. Do you remember what was said?
>
> A. It was one of the two, but I can't tell which.
>
> Q. Do you remember what Moore answered?
>
> A. As near—my recollection tells me as near as I can remember, that he didn't want anything to do with lawyers, he wanted to get it over with."

Mr. John Zeedyke also testified, as shown on page 34 of the Record:

> "He (Judge Weimer) asked him whether he had a lawyer and he also asked him whether he desired to have a lawyer, and to the answer of this both was 'No'."

From the testimony of these witnesses, it is apparent that his rights to an attorney were fully explained to him and the fact that he understood that right is shown by Mr. Schuur's testimony that at the time of arraignment Moore said he didn't want anything to do with lawyers, he wanted to get it over with.

(c) The claim that there was a duty imposed upon the Court to appoint counsel for petitioner even though he had indicated that he did not desire one.

The rule in this regard seems amply stated in *Quicksall*, 339 U.S. 660, where the Court used the following language:

> "To invalidate a plea of guilty, the prisoner must establish that for want of benefit of counsel, an ingredient of unfairness actively operated in the process that resulted in his confinement."

Pertinent language also appears in *Foster vs. People of the State of Illinois*, 332 U.S. 134. In referring to the *De-Meerleer* case, it is stated:

> "Only the other day in a case concerning a charge of first degree murder against a seventeen year old defendant, in which we found a deprivation of rights essential to a fair hearing, we took pains to point out that the Court did not explain the consequences of the plea of guilty and the record indicates considerable confusion in the petitioner's mind at the time of the arraignment to the effect of such a plea."

Referring to the case at bar, the Court said:

> "We thus have in effect the bald claim that merely because the record does not disclose an offer of counsel

of a defendant upon a plea of guilty, although the Court before accepting the plea duly advised him of his 'right of trial', and the consequences of such a plea, he is deprived of rights essential to a fair hearing under the Federal Constitution. We reject such a claim. Most incarcerations are upon pleas of guilty, and probably most such pleas have been made without the felt need of counsel. It is not for us to suggest that it might be desirable to offer every accused who desires to plead guilty the opportunity for counsel and to enter with formality upon the records the deliberate disclaimer of his need for counsel because of a full appreciation of the meaning of a plea of guilty as expounded by responsible judges. Our duty does not go beyond safeguarding 'rights essential to a fair hearing' by the state. After all due process 'itself a historical product,' is not to be turned into a destructive dogma in the administration of systems of criminal justice under which the states have lived not only before the fourteenth amendment, but for the eighty (80) years since its adoption. It does not militate against respect for the deeply rooted systems of criminal justice in the state that such an abrupt innovation as recognition of the constitutional claim herein made implies, would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land."

Prior to the adoption of Court Rule 35-A, the Michigan Supreme Court in *In re Elliott*, 315 Mich. 662 (1946), reviewed the question of the right to counsel in a criminal case.[7] Mr. Justice Boyles, after analyzing the Michigan Constitution and statutes, reviewed the case of *People vs.*

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[7] We discuss the Michigan Supreme Court's rulings on this point to indicate to the Court Michigan's position at the time petitioner offered his plea.

Williams, 225 Mich. 133, and cited from it with approval the following rule as laid down in that case:

> "An accused is not entitled, as of right, to have counsel assigned by the Court to advise him relative to his plea. The State Constitution, Article II, Section 19, secures to an accused the right 'to have counsel for his defense.' This does not mean he shall have counsel at public expense. It is a guarantee of right to employ and have counsel; a right not always recognized in early English criminal cases. Section 15623, 3 Comp. Laws, 1915, also allows an accused to be heard by counsel. This is only declaratory of the right secured to an accused by the provision mentioned in the constitution and is on a par with the right to produce witnesses and proofs in his favor, but does not mean he shall have counsel at public expense. Section 15912, 3 Comp. Laws 1915, permits the Court to appoint an attorney at public expense to conduct the defense of an accused when he is unable to procure counsel. This statute is permissive; its provision requires a showing of inability of an accused to procure counsel, and, as a rule, to which, of course, there may be exceptions, and not be invoked by an accused until after plea and not at all under a plea of guilty."

In his discussion of other cases Justice Boyles also refers to *People vs. Crandell*, 270 Mich 124, where the defendant, charged with murder, petitioned the Court after sentence on a plea of guilty to set aside the plea and sentence and allow the defendant a trial with assistance of counsel. The Court said in that case, at pages 126, 127, 129:

> "Before arraignment Defendant made a written confession and; after plea, was examined by the Judge and again confessed his crime in detail of the circumstances.

Upon his plea, the Court examined witnesses; the written confession was placed in evidence and Court could do no less than sentence him to imprisonment for life for murder in the first degree. Act Number 328, Section 316 Public Acts of 1931.

"No claim is made by Defendant of coercion in obtaining the confession; neither does he now claim that the confession was not true.

"The procedure employed in the instance at bar was expeditious and might well, considering the age of the boy, have been less speedy and an opportunity afforded the father to be present, but, if, in accord with lawful action, we can not set the same aside. The law affords an accused the benefit of counsel if he so desires; of his own selection if employed by him; and by the Court if he is without means and so requests. No request was made and the Court did not exercise the humane power of providing the boy with counsel.

"• • •

"The constitutional provision securing to the accused the right to have the assistance of counsel is not at all applicable to this case."

Thus in *In re Elliott, Supra,* the Michigan Supreme Court, after an exhaustive review of its decisions, concluded that an accused is not entitled as of right to have counsel assigned by court to advise him at public expense relative to his plea. It equates this right to counsel with the right of the accused to produce witnesses and proofs in his favor. We remark (by way of parenthesis) that under the Michigan decisions a plea of guilty may be changed to one of not

guilty at any time prior to sentencing. *People v. Hollingsworth*, 338 Michigan 161.

In discussing this question, it would also seem wise to consider a line of United States Supreme Court cases in which a denial of due process on this ground was claimed.

In *Powell vs. Alabama*, 287 U.S. 45, two young, illiterate, and ignorant Negroes, surrounded by hostile sentiment, were charged with rape of two white girls. They pleaded not guilty. Thereupon the Court appointed "all the members of the bar" for their counsel. Actually, this resulted in their having no effective counsel. Because of the other surrounding circumstances, such as the threat of lynching, the Court found that they had been denied a fair trial. This was commonly interpreted to require the appointment of counsel in a capital case but the case of *Betts vs. Brady, Supra*, qualified this broad general rule as we have seen above.

In view of the overwhelming authority and the fact that this petitioner clearly was afforded chance for counsel and stated without question that he wanted nothing to do with lawyers, but wanted to get it over with, it seems clear that the Court had no duty to force counsel upon him against his wishes.

(d) The claim that respondent was not informed of his right to a trial by jury.

Again we agree that it is desirable, that the Court inform the petitioner of his right to trial by jury. However, it is clear in this case that his right to trial by jury was explained to him and that he waived it. We need only refer to the remark of Judge Weimer at the time of sentence in the official transcript of that proceeding as proof of this:

"In my private interview with Respondent, I assured him that he must not plead guilty unless he really is guilty; that he was not required to plead guilty; that he could have a trial by jury if he desired. He assured me freely and voluntarily that he is guilty and his one desire is to have it all over * * *." (R. 15).

The record also shows on page 17 that the Court gave the petitioner the opportunity to say anything he desired before sentence and the petitioner indicated that he had nothing to say. These remarks of the trial judge were not refuted at the time and the first that was heard from petitioner that he was not apprised of his right to trial by jury was upon his motion for new trial some twelve years later in 1950. It seems clear from this that he not only was fully advised of his rights to trial by jury but that he clearly waived his right to same.

(e) The claim that petitioner was not aware of the consequences of his plea.

It is inconceivable that petitioner now argues that he did not understand the consequences of his plea, since, as late as 1950, he admitted, under oath, that he did understand that he could be sentenced to prison for life. However, we do not need to rely upon his own denial of knowledge of the consequences of his plea since the record is clear that it was fully explained to him. We refer first to the testimony of Reint Schuur; (R. 32) "* * * Mr. Tedrow arraigned him, read the Information, and then he said, 'Which means, and which charges that you did murder on a certain day Mrs. Zeedyk'." (R. 28-32) Mr. Schuur also testified in 1950:

"Then Judge Weimer asked Mr. Moore if he realized the fact that if he, the Judge, determined, that the

plea was a good plea and could be accepted, that he could sentence Mr. Moore to prison for life. Mr. Moore said he realized that" (R. 32-33).

In cross-examination, this matter was once again considered by counsel for petitioner, when he asked Mr. Schuur:

"Q. You distinctly remember that the Judge informed Willie Moore he would be sentenced to life?

A. That he could sentence him to life.

Q. Do you remember that distinctly?

A. I remember that distinctly" (R. 34).

Turning to the testimony of petitioner himself at the motion for new trial in 1950, we find the following questions and answers:

"Q. You stated to Mr. Roxborough that you knew that you would go to prison for life if you pleaded guilty.

A. Well, I didn't know no more than what they told me.

Q. You were told that then?

A. Well, yes, I was told." (R. 42)

This testimony clearly indicates that the consequences of his plea were fully explained to Moore, and that he fully understood them.

The one additional issue raised by petitioner in his discussion of the question above is the fact that the petitioner

was not furnished a copy of the Information and he relies upon the case of *Edwards vs. People*, 39 *Michigan 760*. It should be pointed out, however, that the clear intention of the Court in that case as stated by the writer of the opinion was to say that the purpose of furnishing a copy of the Information to the accused was to enable him to prepare a defense and to make such inquiries as may be necessary about the witnesses endorsed. This clearly applies to a situation where the petitioner has entered a plea of not guilty and wishes to prepare a defense in the case. There is no apparent reason why, if an accused has pleaded guilty, he should be furnished with a copy of the Information, since he is not concerned in preparing a defense. The record is clear, however, from the testimony of Mr. Schuur that the Information was read to this petitioner and in fact Mr. Tedrow, the prosecutor, went on to explain to him that the Information meant that he was charged with the murder of Mrs. Zeedyk. (R. 32-33)

(f) The claim that there was a general denial of petitioner's constitutional rights.

In considering the question of general denial of due process, it is significant to observe the following language in the order sentencing the petitioner entered Saturday, October 29, 1938, and signed by Judge George V. Weimer. The Order states in part as follows:

> "* * * the Court before pronouncing sentence upon such a plea, being satisfied after such investigation as was deemed necessary for that purpose, and by private examination of the Respondent, respecting the nature of the case and the circumstances of such plea, that the same was made freely and with full knowledge of the nature of said accusations, and without any undue influence, and having been, on motion of the Prosecut-

ing Attorney, brought to the bar at the Court for sentence, and having there been asked by the Court if he had anything to say why judgment should not be pronounced against him, and alleging no reason to the contrary * * *." (R. 16-17).

It is submitted that this is a clear and concise statement by the Court in his order of sentence that the Constitutional privileges were extended to this petitioner and that he was accorded a fair and impartial day in Court.

Uveges v. Pennsylvania, 335 U.S. 427 differs from the present case in that the record showed no attempt on the part of the court to make the petitioner understand the consequences of his plea. There was also an undenied allegation on the record that he was never advised of his right to counsel. Here the trial judge stated specifically "from private examination of the respondent, respecting the nature of the case and the circumstances of such plea, that the same was made freely and with full knowledge of such accusation and without any undue influence". The allegations of petitioner are therefore contradicted by the record at the time of the sentence and *Uveges* does not apply.

Fikes v. Alabama, 352 U.S. 191. Here the petitioner was questioned continuously for five days, friends and relatives, and an attorney were denied access to him, and there was testimony by three psychiatrists at the trial . . . to the effect that petitioner was schizophrenic and highly suggestible. It would seem, then that the court placed no little weight on Fikes' mental capacity. Mental capacity of any sort affects the weight to be given a confession and if it is of a serious character it may render a confession inadmissible. However, mental capacity is not the only factor to be considered. Moore did see his parents, the questioning was for a much shorter period than that which transpired

in *Fikes* and the trial very carefully ascertained by questioning him about his schooling and whether his mental capacity was such that he understood the serious nature of the charge.

Petitioner questions the appropriateness of the application of *Quicksall* to the present case by the Michigan Supreme Court. We think the Michigan Supreme Court acted properly. It reviewed the proceedings involving the plea and the subsequent Motion for New Trial in the light of *Quicksall*, and approved them. It also considered the age, the background, the education, the credibility of Moore, and the circumstances surrounding the plea in their totality concluded that the record did not sustain petitioner's claim was deprived of due process. We believe that this ruling of the Michigan Supreme Court is a sound one and should be of very persuasive authority to this Court in its own consideration of the case.

VII

Conclusion

The record is clear that the court room at the time of Moore's plea was less than half full, that there was no excitement or other circumstances which might be held to place the petitioner in a state of apprehension. Therefore, it is apparent that the plea of this petitioner was not gained by duress. He was fully advised of his right to counsel. He was likewise advised of his right to trial by jury, and understood the consequences of his plea of guilty. The facts in this case are, in fact, contrary to those of the DeMeerleer case and other cases in which it was held that there was a deprivation of due process. There was an affirmative show-

ing here that this petitioner was accorded the full protection of the law.

In any event, on the face of the record as it now stands, we respectfully submit that the judgment of the court below should be affirmed.

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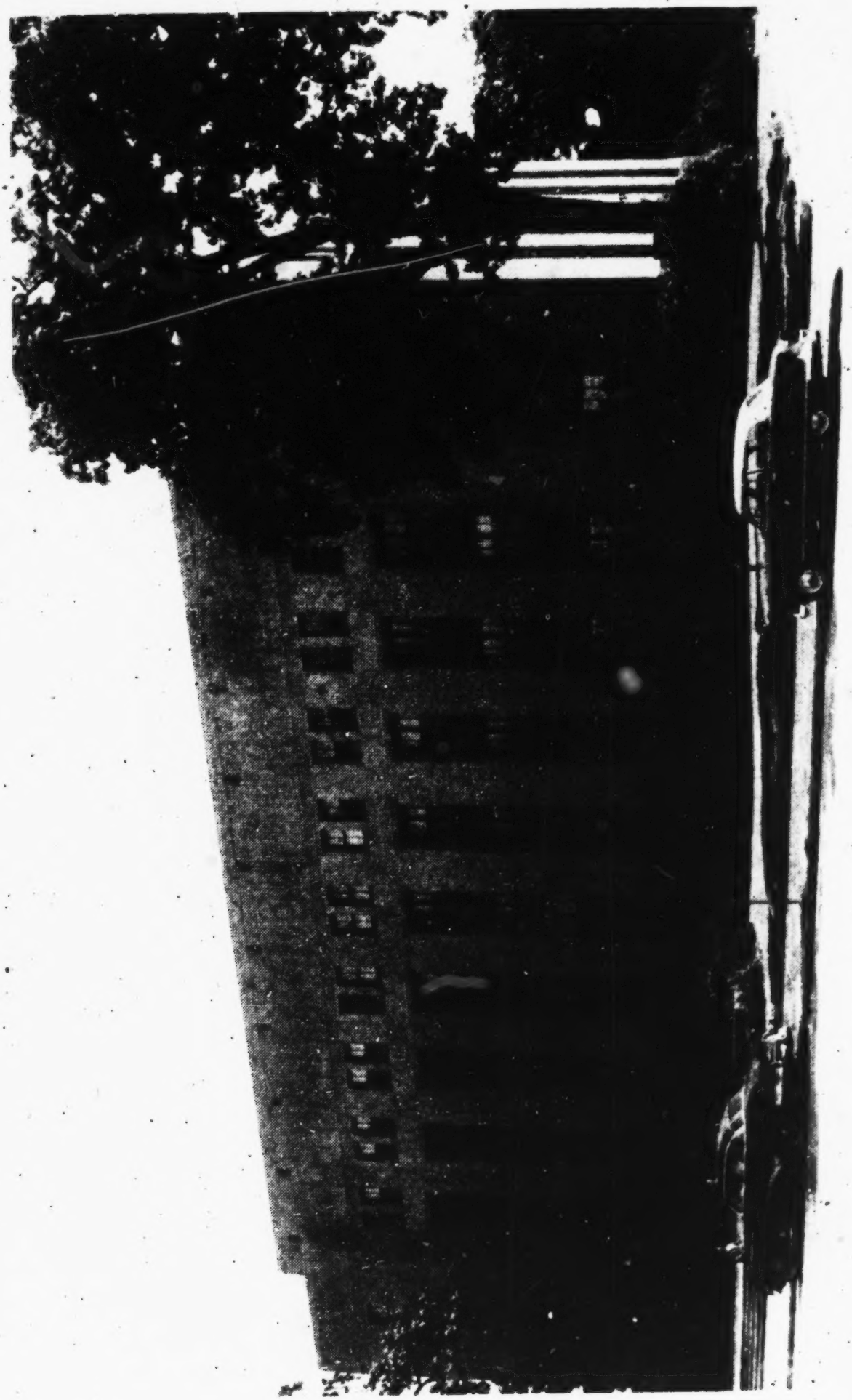

Appendix 1